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No. 09-229

In the Supreme Court of the United States

ABDUL H. KHAN, ET AL., PETITIONERS

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that it lacked jurisdiction to review the Board of Immigration Appeals' conclusion that the lead petitioner failed to establish "to the satisfaction of the Attorney General" "extraordinary circumstances" to excuse the untimely filing of his asylum application under 8 U.S.C. 1158(a)(2)(D).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-25a) is reported at 554 F.3d 681. The decisions of the Board of Immigration Appeals (Pet. App. 26a-29a, 30a-34a) and the immigration judge (Pet. App. 35a-70a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 29, 2009. A petition for rehearing was denied on April 1, 2009 (Pet. App. 1a-2a). On June 19, 2009, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including July 20, 2009. On July 16, 2009, Justice Stevens further extended the time to August 20, 2009, and the petition was

filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that the Secretary of Homeland Security and the Attorney General may, in their discretion, grant asylum to an alien who demonstrates that he is a "refugee" within the meaning of the INA. 8 U.S.C. 1158(b)(1)(A). The INA defines a "refugee" as an alien who is unwilling or unable to return to his country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). The applicant bears the burden of demonstrating that he is eligible for asylum. 8 U.S.C. 1158(b)(1)(B)(i); 8 C.F.R. 1208.13(a), 1240.8(d). Once an alien has established asylum eligibility, the decision whether to grant or deny asylum is left to the discretion of the Attorney General or the Secretary of Homeland Security. 8 U.S.C. 1158(b)(1).

b. An alien who wishes to be granted asylum must file his application within one year of arriving in the United States. 8 U.S.C. 1158(a)(2)(B). An alien who fails to meet that requirement "may be considered" for asylum if he demonstrates "to the satisfaction of the Attorney General" or the Secretary of Homeland Security either the existence of "changed circumstances" that materially affect his eligibility for asylum or "extraordinary circumstances" that excuse his failure to file the application within the one-year period. 8 U.S.C. 1158(a)(2)(B) and (D). The applicant bears the burden of demonstrating, "by clear and convincing evidence,"

that his application for asylum was filed within one year of his arrival in the United States. 8 U.S.C. 1158(a)(2)(B); 8 C.F.R. 1208.4(a)(2)(A).

The Attorney General, who is responsible for adjudicating asylum applications filed by aliens in removal proceedings, 8 U.S.C. 1158(d)(1), has defined the term "extraordinary circumstances" as personal circumstances "directly related to the failure to meet the 1-year deadline" that "were not intentionally created by the alien through his or her own action or inaction," including "[s]erious illness or mental or physical disability," "[l]egal disability," "death or serious illness or incapacity of the applicant's legal representative or a member of the applicant's immediate family," and "[i]neffective assistance of counsel." 8 C.F.R. 1208.4(a)(5). In addition to showing "changed circumstances" or "extraordinary circumstances," the applicant must show that he filed his asylum application within a reasonable period of time given those circumstances. 8 C.F.R. 1208.4(a)(4)(ii) and (5).

c. An applicant who is ineligible for asylum because of an untimely filed application remains eligible for withholding of removal, see 8 U.S.C. 1231(b)(3)(A), and protection under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. See 8 C.F.R. 1208.13(c)(1), 1208.16(c).

Withholding of removal is available if the alien demonstrates that his "life or freedom would be threatened" in the country of removal "because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). In order to establish eligibility for withholding of removal,

an alien must prove a "clear probability of persecution" upon removal, a higher standard than that required to establish asylum eligibility. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430 (1987). Persecution must be at the hands of the government or by an entity that the government is unwilling or unable to control. *In re Pierre*, 15 I. & N. Dec. 461, 462 (B.I.A. 1975). An alien is not eligible for withholding of removal if he or she "could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so." 8 C.F.R. 1208.16(b)(2).

In addition, an alien who demonstrates that he would more likely than not be tortured if removed to a certain country may obtain CAT protection. To qualify for CAT protection, the acts alleged to constitute torture must be inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. 1208.18(a)(1); see, *e.g.*, *Lopez-Soto* v. *Ashcroft*, 383 F.3d 228, 240 (4th Cir. 2004).

d. Under the INA, "[n]o court shall have jurisdiction to review any determination of the Attorney General" regarding the timeliness of an asylum application, including a determination whether the alien has demonstrated to the satisfaction of the Attorney General that there are changed or extraordinary circumstances warranting consideration of an untimely application as a matter of discretion. 8 U.S.C. 1158(a)(3).

In 2005, Congress amended one subsection of the judicial review provision of the INA, 8 U.S.C. 1252(a)(2), to include the following provision:

> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section)

> which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. 1252(a)(2)(D), as added by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310.

2. Lead petitioner Abdul Khan (petitioner) is a native and citizen of Pakistan.[1] Pet. App. 4a. He is a Mohajir, a Pakistani of Indian descent. *Id.* at 39a. He arrived in the United States with several family members in June 1998 on a six-month, non-immigrant visitor visas. *Id.* at 7a.

Petitioner and his family members remained in the United States after their lawful status expired. Pet. App. 7a. In June 2002, the Attorney General announced the National Security Entry-Exit Registration System (NSEERS), which required aliens from particular countries (including Pakistan) to register with immigration officials. *Id.* at 8a. In March 2003, almost five years after he entered the United States, petitioner filed an application for asylum, withholding of removal, and protection under the CAT. *Ibid.* Petitioner contended that he would be persecuted if he returned to Pakistan by the Mohajir Quami Movement (MQM), a political party representing the interests of Mohajirs, because he had quit that organization and stopped providing it with financial support. *Id.* at 39a-43a. The Department of Homeland Security charged petitioner with being removable as an alien who remained in the United States beyond the

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[1] The other petitioners' claims for relief and protection from removal are derivative of the lead petitioner's claims.

time permitted and referred his asylum application to an immigration judge (IJ). Administrative Record (A.R.) 603-605; Pet. App. 37a; see 8 U.S.C. 1227(a)(1)(B).

At his removal hearing, petitioner conceded that he was removable as charged. Pet. App. 37a; A.R. 118. He renewed his application for asylum, withholding of removal, and CAT protection. Pet. App. 37a-38a. In the alternative, he sought voluntary departure. *Id.* at 38a. Petitioner testified that he is a Mohajir and that he was a member of MQM from 1985 to 1994. *Id.* at 39a-40a. He stated that after MQM began using violence to pursue its goals, he left the organization but continued to provide it with financial support. *Id.* at 40a-42a. Petitioner said he eventually stopped providing financial support. *Id.* at 42a. Petitioner stated that in December 1997, he was carjacked by people he thought were MQM members, and that in May 1998, he was kidnaped by MQM members, he believed because he had reported the carjacking to the police. *Id.* at 42a, 55a-57a. Petitioner acknowledged that he came to the United States twice between 1995 and 1998, and returned voluntarily to Pakistan each time. *Id.* at 41a-43a.

The IJ found petitioner removable as charged, rejected his asylum, withholding, and CAT claims, and granted his application for voluntary departure. Pet. App. 35a-70a. The IJ found petitioner ineligible for asylum because he did not file his application within one year of his entry into the United States and did not demonstrate extraordinary circumstances to excuse his untimely filing. *Id.* at 47a-51a.[2] As the IJ explained, petitioner claimed that two circumstances excused his un-

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[2] Petitioner did not argue that the changed circumstances exception to the one-year bar applies in this case.

timely filing: his lack of knowledge about the process for seeking asylum, and mental health issues. *Id.* at 49a-50a.

Regarding the first circumstance, the IJ determined that petitioner actually was aware of the process for seeking asylum, because during his second trip to the United States, petitioner "lived with a friend who was a native of Pakistan and was familiar with seeking asylum," and that friend testified that he advised petitioner to seek asylum at that time. Pet. App. 45a-46a, 49a. In any event, the IJ determined, "ignorance of the law" is not an extraordinary circumstance sufficient to justify an untimely asylum filing. *Id.* at 50a.

With respect to the second circumstance, the IJ determined that petitioner's depression does not qualify as an extraordinary circumstance, and that even if it did, petitioner failed to file his application within a reasonable period of time in light of that circumstance. Pet. App. 50a-51a. The IJ observed that petitioner has been able to work in the United States, rent an apartment, support his family, and "function without any difficulties for more than five years." *Id.* at 50a. The IJ also noted that petitioner "admitted that the only reason he filed for asylum was because he was faced with the NSEERS registration requirement." *Ibid.*

The IJ then denied petitioner's claim for withholding of removal on two independent grounds: the conduct of which he complained did not rise to the level of persecution, and petitioner did not show that any persecution by MQM would be on account of a protected ground. Pet. App. 52a-66a. First, the IJ determined that the alleged carjacking was not past persecution by MQM, because petitioner suffered no physical harm, and there was no evidence that the carjacking was perpetrated by MQM

members. *Id.* at 56a. Further, the IJ found that petitioner's account of being kidnaped by the MQM was "implausible and not credible," *ibid.*,[3] and that even if it had occurred, it did not "rise[] to the level or magnitude sufficient to constitute past persecution when the record is considered in its entirety," *id.* at 59a. The IJ also determined that petitioner failed to show a likelihood of future persecution, because he has voluntarily returned to Pakistan on several occasions; he has been away from Pakistan for seven years, so that "it is not objectively reasonable that there would be any MQM members who would still seek to harm him"; and several family members have continued to live in Pakistan without incident. *Id.* at 64a-65a.

Second, and in any event, the IJ determined that petitioner failed to show that any persecution by the MQM would be based on his political opinion. Pet. App. 61a-64a. As the IJ explained, petitioner contended that he was carjacked because he stopped paying money to MQM, which is not on account of his political beliefs. *Id.* at 63a. Indeed, the IJ noted, petitioner said that the MQM sought payment from everyone in his neighborhood, not just him. *Ibid.* The IJ determined that even if petitioner's account of his kidnaping were credible, the kidnaping was due to the MQM's "belief that [petitioner]

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[3] The IJ explained that petitioner's claim that MQM members kidnaped him in retaliation for reporting the carjacking made no sense, because petitioner was "unsure of who even took his car," and even if it had been the MQM, it was unlikely that the kidnaping was in retaliation for reporting the carjacking to the police, because six months elapsed between the two events. Pet. App. 57a-58a. The IJ also observed that petitioner's wife's testimony was inconsistent with his story, *ibid.*, and the fact that he made multiple trips to the United States but then voluntarily returned to Pakistan each time undercut his claim, *id.* at 58-59a.

was a police informer," not petitioner's political opinion. *Id.* at 63a-64a.

The IJ then denied petitioner's CAT claim, finding that petitioner failed to show that he would be tortured by the MQM if he returned to Pakistan and that such torture would be with the consent or acquiescence of the government. Pet. App. 68a. Finally, the IJ granted petitioner's application for voluntary departure and stated that he must depart the United States by July 11, 2005. *Id.* at 68a-69a.

3. The Board of Immigration Appeals (Board) dismissed petitioner's appeal. Pet. App. 26a-29a. The Board "adopted and affirmed" the IJ's decision. *Id.* at 27a. With respect to the question whether to excuse petitioner's untimely filing of his asylum application, the Board found no clear error in the IJ's factual findings and "agree[d] with the [IJ's] analysis." *Ibid.* The Board stated, in particular, that petitioner's "generalized medical/psychological evidence does not suggest that he was unable to timely file his claim." *Ibid.* The Board also "agree[d]" with the IJ's denial of withholding of removal and CAT protection, and it ordered petitioner to voluntarily depart the United States within 60 days. *Id.* at 28a-29a. To the best of the government's knowledge, petitioner did not depart within the time permitted.

Petitioner filed a petition for review of the Board's decision. Petitioner then filed a motion to reopen his immigration proceedings, which the Board denied. Pet. App. 30a-34a. The Board explained that the medical evidence petitioner proffered with his motion to reopen was not new, previously unavailable evidence, because the IJ considered similar medical evidence and determined that, even in light of that evidence, it was unreasonable for petitioner to wait five years to file his asylum

application in light of the fact that he was able to work steadily in the United States, support his family, send money back to relatives in Pakistan, and make plans for the future. *Id.* at 32a-33a. Further, the Board determined that the evidence that "recount[ed] the incidents of physical assault" against petitioner did not justify reopening, because the IJ found that even if those events occurred, petitioner failed to show that they were on account of a protected ground. *Id.* at 33a-34a.

Petitioner filed a petition for review of the denial of his motion to reopen, which was consolidated with the petition for review he had previously filed.

4. The court of appeals denied in part and dismissed in part the consolidated petition for review. Pet. App. 1a-25a. As relevant here, the court held that under 8 U.S.C. 1158(a)(3), it lacked jurisdiction to review the Board's determination that petitioner had failed to sufficiently demonstrate extraordinary circumstances to excuse petitioner's late filing of his asylum application. Pet. App. 9a-17a. The court explained that it lacked jurisdiction under Section 1158(a)(3) "to review any decision the agency makes under § 1158(a)(2), including decisions relating to whether the applicant has demonstrated 'extraordinary circumstances' excusing a delay in filing an asylum application." *Id.* at 10a. The court further explained that Section 1252(a)(2)(D) does not restore jurisdiction over petitioner's claim, because "factual determinations (such as whether the asylum application was filed within the one-year deadline) and discretionary decisions (such as whether the alien has demonstrated 'extraordinary circumstances' justifying the delay) do not fall within the exception * * * for constitutional claims or questions of law." *Id.* at 10a-11a. The court concluded that petitioner's claim, which

was "an objection to the IJ's factual findings and the balancing of factors in which discretion was exercised," raised no question of law and therefore was unreveiwable. *Id.* at 15a-16a (internal quotation marks omitted).

The court of appeals also upheld the denials of petitioner's claims for withholding of removal and CAT protection as supported by substantial evidence, Pet. App. 17a-22a, and determined that the Board did not abuse its discretion in denying petitioner's motion to reopen, *id.* at 22a-25a. Petitioner does not seek review of those rulings.

ARGUMENT

Petitioner contends (Pet. 27) that the court of appeals erred in holding that it lacked jurisdiction to review the determination of the Board of Immigration Appeals that petitioner failed to demonstrate to its satisfaction extraordinary circumstances that would warrant consideration of his untimely asylum application. The court of appeals correctly rejected that contention. But while petitioner's application for the discretionary relief of asylum was rejected as untimely, he was still permitted to apply for withholding of removal. The IJ and the Board fully considered petitioner's withholding claim on the merits and rejected it as not supported by the evidence. The court of appeals sustained the Board's ruling on that issue, and petitioner has not sought review of that ruling in this Court. This case thus presents only the issue whether the court of appeals erred in concluding that it did not have jurisdiction to review the Board's rejection as untimely of petitioner's additional request for the related discretionary relief of asylum, including the Board's determination that he had not made a sufficient showing to the satisfaction of the Board of extraordinary circumstances that would warrant an exercise of

the Board's discretion to consider petitioner's asylum application notwithstanding its untimely filing.

All but one of the courts of appeals to consider the issue have held that they do not have jurisdiction under 8 U.S.C. 1252(a)(2)(D) to review the Board's determination that an alien failed to demonstrate to its satisfaction that there were changed circumstances or extraordinary circumstances warranting consideration of an untimely application. The Ninth Circuit has reached a contrary conclusion. The Court has nonetheless denied certiorari petitions raising this issue on a number of occasions. See *Eman* v. *Holder*, 130 S. Ct. 62 (2009) (No. 08-1317); *Viracacha* v. *Mukasey*, 129 S. Ct. 451 (2008) (No. 07-1363); *Kourouma* v. *Mukasey*, 128 S. Ct. 1868 (2008) (No. 07-7726); *Lopez-Cancinos* v. *Gonzales*, 550 U.S. 917 (2007) (No. 06-740).[4] No different disposition is warranted here. The court of appeals was correct in holding that it lacked jurisdiction to review petitioner's challenge to the denial of his request for asylum, and, in any event, resolution of the jurisdictional question would not change the outcome of petitioner's case.

1. The court of appeals correctly determined that it lacked jurisdiction over petitioner's fact-bound claim. The ultimate question whether petitioner demonstrated to the satisfaction of the Attorney General the existence of extraordinary circumstances that might warrant consideration of an untimely claim for relief is committed to the Attorney General's discretion based on his own assessment of the circumstances. The INA provides that the Attorney General "may" consider an untimely asylum application if the alien demonstrates changed or

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[4] This question is also presented in *Gomis* v. *Holder*, petition for cert. pending, No. 09-194 (filed Aug. 11, 2009).

extraordinary circumstances "to the satisfaction of the Attorney General." 8 U.S.C. 1158(a)(2)(D). As the court of appeals explained (Pet. App. 11a), Congress's use of the word "may" "expressly recognizes substantial discretion," *Haig* v. *Agee*, 453 U.S. 280, 294 n.26 (1981), and the phrase "to the satisfaction of the Attorney General" demonstrates Congress's intent that the Attorney General's assessment "entails an exercise of discretion," *Sukwanputra* v. *Gonzales*, 434 F.3d 627, 635 (3d Cir. 2006), in deciding whether to forgive the alien's default. Cf. *Webster* v. *Doe*, 486 U.S. 592, 600 (1988).

In light of the nature of the determination committed to the Attorney General, Congress expressly barred judicial review of such a determination when it enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. Under 8 U.S.C. 1158(a)(3), "[n]o court shall have jurisdiction to review any determination" regarding the application of the one-year filing deadline for asylum claims, including the determination that a particular asylum applicant has not "demonstrate[d] to the satisfaction of the Attorney General * * * the existence of changed circumstances [that] materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing." 8 U.S.C. 1158(a)(2)(D). As petitioner acknowledges (Pet. 13-14), his petition for review challenged a determination that he had failed to sufficiently demonstrate extraordinary circumstances to forgive that untimely filing. Judicial review of petitioner's challenge is therefore barred by 8 U.S.C. 1158(a)(3).

Significantly, however, an alien is not without an avenue for relief when the Attorney General determines that the alien has not demonstrated to his satisfaction

the existence of circumstances warranting consideration of the application for the discretionary relief of asylum notwithstanding his failure to file within the one-year deadline. The alien remains eligible for mandatory withholding of removal under 8 U.S.C. 1231. But in this case the IJ and the Board rejected that claim. The court of appeals sustained that determination, and petitioner has not sought review of the court of appeals' ruling in this Court.

Petitioner contends (Pet. 27-36), however, that judicial review of the rejection of his asylum claim as untimely should have been available as well, because, he asserts, this case falls within the provision in 8 U.S.C. 1252(a)(2)(D), enacted in 2005 as part of the REAL ID Act, that allows for judicial review of "questions of law." The structure of 8 U.S.C. 1158(a)(2) and (3) demonstrate, however, that Congress did not regard a fact-bound and discretionary determination by the Attorney General under Section 1158(a)(2)—that an alien had not shown to the Attorney General's satisfaction that there were circumstances that warranted forgiving his procedural default and consideration of his untimely application—to present matters of law of a sort appropriate for judicial review. The enactment of Section 1252(a)(2)(D) in 2005 did not fundamentally alter that judgment of Congress concerning the nature of the Attorney General's determinations about untimely asylum applications, and the court of appeals therefore correctly held that petitioner's challenge to the Board's fact-bound determination did not raise a "question[] of law."

In this case, the applicable principles are undisputed. Petitioner has not advanced any argument that the Board erred in construing the term "extraordinary circumstances," even assuming that the Attorney General's

application of that provision in the course of a determination under 8 U.S.C. 1158(a)(2) might be reviewable in some circumstances. Instead, petitioner takes issue with the Board's holding that he failed to adduce facts sufficient to show extraordinary circumstances warranting consideration of his untimely application. Pet. 32-33. As the court of appeals explained, petitioner's argument was "an objection to the IJ's factual findings and the balancing of factors in which discretion was exercised." Pet. App. 15a; see *id.* at 10a (petitioner argued that "the IJ did not give appropriate weight" to his evidence of mental disability); *ibid.* ("the IJ did not think that [petitioner] presented sufficiently compelling circumstances to excuse his nearly five-year delay"). That determination is not a legal determination, but a factual determination involving judgment and discretion. If petitioner's fact-bound challenge to such a determination by the Attorney General raised a "question[] of law," then any error might be a question of law, thereby rendering the jurisdictional bar in 8 U.S.C. 1158(a)(3) meaningless. See, *e.g.*, *Higuit* v. *Gonzales*, 433 F.3d 417, 420 (4th Cir.) (courts "are not free to convert every immigration case into a question of law, and thereby undermine Congress's decision to grant limited jurisdiction over matters committed in the first instance to the sound discretion of the Executive"), cert. denied, 548 U.S. 906 (2006)

Indeed, a challenge to such a determination by the Attorney General is precisely the type of claim over which Congress intended to withhold jurisdiction when it enacted 8 U.S.C. 1252(a)(2)(D). Congress added the exception for "constitutional claims or questions of law" in response to concerns this Court raised about reviewability of removal orders in *INS* v. *St. Cyr*, 533 U.S. 289 (2001). In *St. Cyr*, the alien's petition for a writ of ha-

beas corpus "raise[d] a pure question of law"—whether, "as a matter of statutory interpretation," the Board erred n determining that he is not eligible for relief. *Id.* at 298. The alien did not challenge the Board's fact-finding, nor did he "contend that he would have any right to have an unfavorable exercise of the Attorney General's discretion reviewed in a judicial forum." *Ibid. St. Cyr* distinguished those types of claims from a "pure legal claim" such as a statutory-interpretation issue, and only stated that precluding judicial review of the latter would raise serious constitutional questions. *Ibid.* (alien "d[id] not dispute any of the facts that establish his deportability or the conclusion that he is deportable"); see Pet. App. 13a.[5]

As the court of appeals explained (Pet. App. 13a-14a), the Conference Report accompanying the REAL ID Act demonstrates that Congress did not intend the courts of appeals to review the application of undisputed rules of law to the facts of particular cases. The Report made clear that a claim with both factual and legal elements (a "mixed question of law and fact") is not freely reviewable under Section 1252(a)(2)(D). H.R. Conf. Rep. No. 72, 109th Cong., 1st Sess. 175 (2005). Instead, the Report explained that when a court is presented with such a claim, it "should not review any factual elements," such as "questions that courts would review under the

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[5] As the court of appeals explained (Pet. App. 16a n.4), its holding that petitioner failed to present a "question[] of law" does not raise serious constitutional concerns, because although the *St. Cyr* Court said that "'entirely preclud[ing] review of a pure question of law by any court would give rise to substantial constitutional questions,'" it "did not suggest that the inability to review mixed questions of law and fact would raise constitutional concerns." *Id.* at 16a (quoting *St. Cyr*, 533 U.S. at 300).

'substantial evidence'" standard. *Id.* at 175-176. This Court has taken a similar approach in other contexts. For example, in *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 840-841 (1996), involving tort claims in district court, the Court concluded that "[t]he issues of proximate causation and superseding cause involve application of law to fact, which is left to the factfinder, subject to limited review." In the INA, involving the special context of judicial review of agency action, Congress chose to preclude review of such fact-based determinations that arise in connection with an alien's request that the Attorney General exercise his discretion to forgive his procedural default and consider an untimely asylum application. Reading "questions of law" in 8 U.S.C. 1252(a)(2)(D) to encompass determinations such as those would have the opposite effect of what Congress intended when it committed certain determinations to the judgment and discretion of the Attorney General. See, *e.g.*, *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486-487 (1999). Because petitioner brought a fact-bound challenge to a judgment call by the agency, his petition for review did not raise a "question[] of law" on this issue under 8 U.S.C. 1252(a)(2)(D), and the court of appeals therefore correctly determined that it lacked jurisdiction to consider it.

2. The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits have held that a challenge to the Board's determination that an alien failed to demonstrate "extraordinary circumstances" that would warrant consideration of an untimely asylum application normally does not raise a "question[] of law" within the meaning of 8 U.S.C. 1252(a)(2)(D). See, *e.g.*, *Gomis* v. *Holder*, 571 F.3d 353, 358-359 (4th Cir. 2009) (changed or extraordinary circumstances), petition

for cert. pending, No. 09-194 (filed Aug. 11, 2009); *Usman* v. *Holder*, 566 F.3d 262, 267 (1st Cir. 2009) (changed or extraordinary circumstances); *Viracacha* v. *Mukasey*, 518 F.3d 511, 514-516 (7th Cir.) (changed or extraordinary circumstances), cert. denied, 129 S. Ct. 451 (2008); *Zhu* v. *Gonzales*, 493 F.3d 588, 596 & n.31 (5th Cir. 2007) (extraordinary circumstances); *Chen* v. *United States Dep't of Justice*, 471 F.3d 315, 330-332 (2d Cir. 2006) (changed or extraordinary circumstances); *Ferry* v. *Gonzales*, 457 F.3d 1117, 1130 (10th Cir. 2006) (changed or extraordinary circumstances); *Almuhtaseb* v. *Gonzales*, 453 F.3d 743, 748-749 (6th Cir. 2006) (changed circumstances); *Sukwanputra*, 434 F.3d at 635 (changed or extraordinary circumstances); *Ignatova* v. *Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005) (extraordinary circumstances); *Chacon-Botero* v. *United States Att'y Gen.*, 427 F.3d 954, 957 (11th Cir. 2005) (extraordinary circumstances). Those courts have explained that a challenge to the Board's determination that an alien did not establish changed circumstances or extraordinary circumstances "is merely an objection to the IJ's factual findings and the balancing of factors in which discretion was exercised," not an argument that raises a "question[] of law" under 8 U.S.C. 1252(a)(2)(D). *Chen*, 471 F.3d at 332.

The Ninth Circuit has held that an alien's challenge to the Board's determination that he has not established changed circumstances or extraordinary circumstances does raise a "question[] of law" under 8 U.S.C. 1252(a)(2)(D). See *Ramadan* v. *Gonzales*, 479 F.3d 646, 649-656 (2007) (changed circumstances). In the Ninth Circuit's view, the term "questions of law" in 8 U.S.C. 1252(a)(2)(D) "extends to questions involving the application of statutes or regulations to undisputed facts,

sometimes referred to as mixed questions of fact and law." *Ramadan*, 479 F.3d at 650.[6]

That disagreement in the courts of appeals does not warrant this Court's attention at this time or in this case.

a. For several reasons, this case would not be a suitable vehicle for consideration of the issue petitioner seeks to raise. The court of appeals observed that the line between legal issues that can be reviewed and factual or discretionary determinations that cannot be reviewed "is occasionally difficult to draw." Pet. App. 14a. But here, the court concluded, it could determine its lack of jurisdiction "fairly readily" because it was "clear" the court was "being asked to review either factual determinations or the manner in which the agency weighed the various factors that inform its exercise of discretion." *Ibid.* This case therefore does not clearly present the issue petitioner seeks to raise. The court likewise found that this case did not fall within an exception recognized in several cases for the application of law to undisputed facts, noting that this case did not involve undisputed facts and distinguishing the Ninth Circuit's decision in *Ramadan*. See *id.* at 17a n.5. And finally, the Board in this case declined to find extraordinary circumstances on the *independent* ground that petitioner did not in any event file his application with a "reasonable" time (see pp. 20-21, *infra*), an inherently fact-based judgment. For these reasons, this case does not present an appro-

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[6] Petitioner cites (Pet. 23-26) a variety of cases concerning whether determinations other than whether an alien demonstrated changed or extraordinary circumstances to excuse an untimely asylum filing present "questions of law." Because whether a petition for review presents a "question[] of law" depends on the precise nature of the claim raised, those cases are inapposite.

priate occasion for consideration of the jurisdictional issue petitioner has identified.

b. Even if there were jurisdiction, petitioner could not show that the Board erred in failing to consider his untimely asylum application. The governing considerations, which are cast in general terms for the Attorney General to consider to his satisfaction, are undisputed. Petitioner does not contend that the Board used an incorrect legal standard. Instead, he argues that the Board erred in "appl[ying] the statutory standards to the historical facts of the case." Pet. 33.

Petitioner appears to have abandoned his argument that his lack of knowledge about the asylum process was an extraordinary circumstance warranting consideration of his untimely asylum application. In any event, the IJ made the factual finding that petitioner actually had been advised of the process, Pet. App. 49a-50a & n.5, and that finding is supported by substantial evidence. Petitioner now contends only that his psychological condition was an extraordinary circumstance that excused his untimely application. Pet. 11-12, 32-33. The IJ and Board rejected that claim on the ground that his mental health issues were not sufficiently serious to qualify as an extraordinary circumstance, Pet. App. 27a, 50a, and that finding would be reviewed under the substantial evidence standard, *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 (1992), and would be "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary," 8 U.S.C. 1252(b)(4)(B). Petitioner has not attempted to show that the Board's fact-specific conclusions were not supported by substantial evidence.

But even if petitioner were correct that his mental health issues qualified as an extraordinary circumstance, that would not excuse the untimely filing of his

asylum application. It is well-established that in addition to showing changed or extraordinary circumstances, an asylum applicant must show that he filed his asylum application within a reasonable period of time given those circumstances. 8 C.F.R. 1208.4(a)(4)(ii) and (5). The IJ and Board declined to consider petitioner's untimely asylum application for a second, independent reason: the application was not filed within a reasonable period of time in light of the circumstances alleged. Pet. App. 27a, 32a-33a, 50a-51a. Before the court of appeals, petitioner argued only that the IJ erroneously held, as a matter of law, that "applying for asylum multiple years after the expiration of the one-year period is *per se* not reasonable," 06-3966 Pet. C.A. Br. 35 (internal quotation marks omitted)—he did not argue that waiting five years was reasonable in the facts of this case. The IJ plainly did not adopt a *per se* rule regarding reasonableness; rather, the IJ explained that because petitioner was able to obtain steady work, rent an apartment, and provide for his family, it was not reasonable for him to wait for five years before seeking asylum. Pet. App. 50a-51a. That determination is supported by substantial evidence, and petitioner has not challenged it in this Court. See Pet. 13, 32-33. Thus, even if the court of appeals had jurisdiction, the court of appeals would uphold the Board's determination that petitioner's untimely application does not warrant consideration because of his excessive delay in filing in light of the circumstances alleged.

c. In any event, petitioner's asylum claim fails on the merits. The court of appeals expressly upheld the Board's determination that any mistreatment petitioner suffered was not on account of a protected ground, and that finding is fatal to his asylum claim.

The court of appeals held that substantial evidence supports the Board's conclusion that the MQM's mistreatment of petitioner was not on account of his political opinion. Pet. App. 20a-21a. The court explained that petitioner testified that "the MQM extorted money and property from Pakistanis indiscriminately" and that "the MQM demanded payment from every person in [petitioner's] neighborhood, including those who had never joined the organization." *Id.* at 20a. Those facts, the court explained, refuted petitioner's claim that he was targeted because of his political opinion and suggested that "the MQM was motivated more by financial gain rather than political philosophy." *Ibid.* Moreover, the court observed, "MQM members began assaulting [petitioner] only after he stopped his payments and approached the police"—"not when he left the organization"—which supports the view that the MQM wanted money and "to avoid criminal prosecution," not to "punish [petitioner] for his political opinion." *Id.* at 21a.

An applicant for asylum, like an applicant for withholding of removal, must show that any persecution would be on account of a protected ground, namely, "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A); see 8 U.S.C. 1231(b)(3)(A) (withholding of removal). Although the standards for asylum and withholding differ in terms of the probability of persecution required, they are the same in that both require this nexus to a protected ground. See, *e.g.*, *INS* v. *Stevic*, 467 U.S. 407, 429-430 (1984); see also Pet. 12 n.3 (acknowledging this fact). The court of appeals found that petitioner failed to satisfy this nexus requirement with respect to his claims of mistreatment by the MQM, and petitioner does not challenge that holding here. See Pet.

13 ("[T]hose merits rulings are not at issue in this petition."). As a result, petitioner's asylum claim fails on the merits. For this reason as well, this Court's review is unwarranted.[7]

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[7] Because jurisdiction to review the Attorney General's timeliness determination under 8 U.S.C. 1158(a)(2) in this case was precluded by the special jurisdictional bar in 8 U.S.C. 1158(a)(3), there is no need to consider whether jurisdiction was also precluded by 8 U.S.C. 1252(a)(2)(B)(ii), which bars jurisdiction to review any decision of the Attorney General that is specified under the relevant subchapter of the INA to be in the discretion of the Attorney General. There accordingly is no occasion to hold the petition in this case pending the Court's decision in *Kucana* v. *Holder*, No. 08-911 (argued Nov. 10, 2009), which concerns the scope of 8 U.S.C. 1252(a)(2)(B)(ii). (Section 1252(a)(2)(B)(ii) excepts from its bar "the granting of relief under section 1158(a)," but that exception refers to the granting (or denial) of the discretionary relief of asylum on the merits, not a determination concerning the one-year filing requirement.)

Moreover, even though petitioner filed a petition for review of the Board's denial of his motion to reopen, that does not provide a reason to hold the petition for the Court's decision in *Kucana*. The court of appeals considered the merits of petitioner's claim and concluded that the Board did not abuse its discretion in denying the motion to reopen, Pet. App. 22a-25a, and petitioner does not seek review of any issue concerning the denial of his motion to reopen.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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